

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HOLLY M. FLEMING,

Defendant.

**8:22-CR-59**

**MEMORANDUM AND ORDER ON  
MOTION TO DISMISS**

This matter is before the Court on Defendant Holly M. Fleming’s Motion to Dismiss Count IV of the Superseding Indictment. [Filing 53](#). Count IV of the Superseding Indictment charges Defendant with “using and carrying a firearm” and “possessing a firearm” in furtherance of a drug trafficking crime in violation of [18 U.S.C. § 924\(c\)\(1\)\(A\)](#). [Filing 35 at 2](#). According to Defendant, Count IV is duplicitous and, therefore, should be dismissed. [Filing 53 at 2–5](#). The Government responds that Count IV is not duplicitous. [Filing 56 at 4–11](#). Alternatively, the Government requests that if the Court finds that Count IV is duplicitous, that the appropriate remedy is to allow the Government to proceed on the “possession” prong of Count IV.

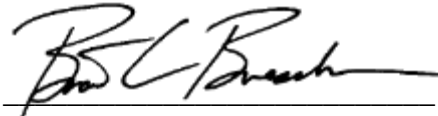
The Court confronted this issue on Defendant’s previous Motion to Dismiss, which was made against Count IV of the Indictment. In its August 23, 2022, Order, the Court concluded that, under the Eighth Circuit Court of Appeals Case [United States v. Gamboa](#), 439 F.3d 796 (8th Cir. 2006), [18 U.S.C. § 924\(c\)\(1\)\(A\)](#) contains two offenses with at least one element not in common. As a result, the Court found that Count IV of the Indictment was duplicitous. Count IV of the Superseding Indictment is expressed in identical terms to Count IV of the Indictment. Moreover, the Government has not posited any new arguments in its current brief in opposition that the Court did not already address in its prior Order.

For the reasons expressed in the Court's prior Order, [Filing 48](#), the Court concludes that Count IV of the Superseding Indictment is duplicitous. Moreover, the Court agrees with the Government that dismissal of Count IV is not the appropriate remedy and will permit the Government to proceed under the "possession prong" of Count IV. See *United States v. Navarro-Gonzalez*, No. 8:21CR72, 2021 WL 3684484, at \*2 (D. Neb. June 1, 2021), *report and recommendation adopted*, No. 8:21CR72, 2021 WL 2910702 (D. Neb. July 12, 2021); see also [Filing 30 at 3–4](#); [Filing 48 at 8–9](#). Accordingly,

IT IS ORDERED that Defendant's Motion to Dismiss, [Filing 53](#), is granted in part and denied in part.

Dated this 9th day of September, 2022.

BY THE COURT:

A handwritten signature in black ink, appearing to read "B. C. Buescher", written over a horizontal line.

Brian C. Buescher  
United States District Judge